APPENDIX A — OPINION OF THE COURT OF APPEAL FOR THE FOURTH CIRCUIT, STATE OF LOUISIANA DATED APRIL 11, 2001

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

NO. 2000-CA-1120

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ

VERSUS

SMEDVIG TANKSHIPS, LTD. ET AL.

APPEAL FROM
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT
NO. 38-719, DIVISION "B"
Honorable William A. Roe, Judge

Judge Miriam G. Waltzer

(Court composed of Chief Judge William H. Byrnes III, Judge Miriam G. Waltzer and Judge Michael E. Kirby)

* * *

Defendants appeal the trial court's judgments taxing costs in favor of both the plaintiff and the sheriff of Plaquemines Parish. The trial court awarded the sheriff a commission of 6% (six percent) of the principal amount of the judgment or $293,600.34. By separate judgment, the trial court awarded cost to the plaintiff in the amount of $49,979.81.

Appendix A

STATEMENT OF THE FACTS AND HISTORY OF THE CASE

On 22 August 1994, Carlos Valdez, through his guardian Nestor Abuan, sued various defendants, Smedvig Tankships, Ltd., Smedvig Tankships (Agencies) Ltd., Smedvig Tankships Management Ltd., Smedvig Tankships, A.S., a/k/a Smedvigs Tankrederi, A.S., Peder Smedvig, A.S., Peder Smedvig Singapore PTE, Ltd., K.S. Smedvig Tankers V, and K.S. Smedvig Tankers VI. After trial of this admiralty claim, the trial court found for Valdez and awarded him damages. After appeal to this court, the award to Valdez was amended, and the damages totaled $4,893,339.00.

On the same day Valdez filed this suit, he requested a writ of attachment, and pursuant to the trial court's order such a writ issued, and the sheriff of Plaquemines Parish seized a vessel belonging to defendants. The court ordered Valdez to furnish security in the sum of $250.00. Pursuant to Valdez' motion, the trial court ordered the vessel released on 25 August 1994, substituting in its place a letter of undertaking.

On 9 April 1996, Valdez moved to tax costs, including witness fees and expenses. On 19 January 1999, Valdez and the sheriff of Plaquemines Parish moved to tax as costs the sheriff's commission, pursuant to LSA-R.S. 33:1428. On 10 September 1999, the trial court awarded the sheriff a commission, totaling $293,600.34. On 28 September 1999, the trial court awarded Valdez costs totaling $49,979.81. Defendants have appealed the judgments awarding the sheriff his commission and Valdez his costs.

Appendix A

FIRST ASSIGNMENT OF ERROR: The trial court erred by awarding the sheriff his commission, under LSA-R.S. 33:1428, on the writ as a cost against defendants pursuant to LSA-C.C.P. art. 1920.

Valdez and the sheriff moved to recover the sheriff's commission from the defendants. The trial court awarded the sheriff the commission against the defendants as a cost of these proceedings. Defendants argue that only the plaintiff is responsible for payment of the commission to the sheriff, but Valdez argues that the commission can be taxed as a cost. We must consider various legislative pronouncements.

LSA-C.C.P. art. 1920 provides;

> Unless the judgment provides otherwise, costs shall be paid by the party cast, and may be taxed by a rule to show cause.
>
> Except as otherwise provided by law, the court may render judgment for costs, or any part thereof, against any party as it may consider equitable.

LSA-R.S. 13:4533 provides;

> The costs of the clerk, sheriff, witness fees, costs of taking depositions and copies of acts used on the trial, and all other costs allowed by the court, shall be taxed as costs.

Appendix A

LSA-R.S. 33:1428(A) provides, in pertinent part;

(13)(a) In all cases where the sheriffs have in their possession for execution of a writ of fieri facias, a writ of seizure and sale, or any conservatory or other writ under which property is or may be seized:

(i) When there has been an adjudication which is not completed as a result of instructions given by the plaintiff in writ or for any reason; or

(ii) When the plaintiff in writ receives cash, other consideration, or both pursuant to judgment rendered in suit in which the writ issued without the necessity of judicial sale; or

(iii) When the suit in which the writ is issued is discontinued by the plaintiff in writ; or

(iv) When at the request of the plaintiff in writ the writ is recalled or dissolved or its further execution discontinued; or

(v) When the parties in interest make an amicable settlement or compromise or enter into any other agreement under the terms of which the writ is recalled or dissolved or the further execution discontinued;

the sheriffs shall be entitled to receive a fee or commission as in the case of a sale.

Appendix A

> (b) But in the discretion of the sheriffs and under circumstances satisfactory to them, they may modify or reduce any fee or commission due and payable under the provisions of this Paragraph. However, if the property is the debtor's homestead exempt residence and there has been a settlement or compromise between the parties, the fee or commission shall be calculated on the amount of the settlement or compromise.
>
> (c) **The fees or commission provided for in this Paragraph shall be due and payable in every case by the plaintiff in writ** and shall be due and payable under the circumstances above set forth even though there has only been a constructive seizure or where property seized under any of the writs hereinabove enumerated has been released on bond.[1]

[Emphasis added.]

Moreover, LSA-33:1428 was amended by Acts 1999, No. 428, § 1, to provide, "The fees or commissions provided for in this Section may be taxed as costs of court pursuant to Code of Civil Procedure Article 1920." In light of LSA-13:4533, we find no error in the trial court's conclusion that the 1999 amendment to LSA-R.S. 33:1428 is interpretative legislation. We will consider the statute as amended.

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1. There is an exception to the rule that the plaintiff in writ must pay the sheriff's fees in the instances provided in LSA-R.S. 33:1428(13). *Tucker*, *infra* at Ftn. 3. When no judgment is rendered and the parties settle, the parties are liable in solido for the fee. LSA-R.S. 33:1428(13)(d).

Appendix A

The parties contest neither the existence of an obligation owed to the sheriff nor the amount of the commission ordered by the trial court.[2] On appeal, we are concerned with who must pay the sheriff's fee. When statutes are clear and unambiguous, no further inquiry may be made into legislative intent. Courts must apply the law as written, unless the application would lead to absurd consequences. LSA-C.C. art. 9; *Turner v. E.I. Du Pont De Nemours and Company*, 93-1005 (La. 3/24/94), 634 So.2d 356, 358.

LSA-C.C. art. 9 is the Louisiana enactment of the "plain meaning rule" that "[w]hen the intention of the legislation is so apparent from the face of the statute that there can be no question as to its meaning, there is no room for construction." *Louisiana Municipal Association v. State of Louisiana*, 2000-0374 (La. 10/9/00); 773 So.2d 663, 669, *quoting* Norman J. Singer, *Statutes and Statutory Construction* §46.01 (6th ed. 2000). Varying from the literal language of a statute and finding "room for construction" or interpretation of the statute is done infrequently by courts and only under limited circumstances. A "court may consider the spirit and reason of a statute where the literal meaning . . . would defeat the clear purpose of the lawmakers." *Id. quoting Curatorship of Parks*, 210 La. 63, 26 So.2d 289, 292 (La. 1946), *citing* Earl T. Crawford, *The Construction of Statutes* § 178 (1940).

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2. Moreover, we are cognizant of the discretion afforded sheriffs in such cases where a fee is allowed under LSA-R.S. 33:1428(13) to "modify or reduce" the obligation of the plaintiff in writ. We are mindful of this discretion and the inherent difference between such a commission and fixed costs.

Appendix A

Valdez argues that although LSA-R.S. 33:1428 obligates him to pay the sheriff's commission, that the trial court properly shifted this cost to the defendants. In the present case, a literal interpretation of LSA-R.S. 33:1428 would allow a court to tax as cost the sheriff's commission, but in certain limited circumstances, the "plaintiff in writ" would be required to pay and then presumably the court could tax the fee as cost. The Legislature intended to insure that the sheriff was paid his fee or commission. LSA-R.S. 33:1428. Those fees are clearly taxable as costs of litigation. LSA-R.S. 13:4533 and LSA-33:1428(C). A literal reading of the statute allows the sheriff to recover his fee or commission from the party or parties taxed with costs generally but only from the "plaintiff in writ" in limited circumstances. We do not believe the Legislature intended the sheriff's ability to recover his fee be so limited.

The defendants argue that the Supreme Court decided this issue in a prior decision. *Tucker v. Fowler*, 95-1649 (La. 2/28/96); 668 So.2d 718. In *Tucker*, the trial court denied the sheriff's motion to tax costs, including a commission, for his service of a writ of fieri facias, requested by the plaintiff, after judgment for the plaintiff went unpaid. However, the writ did not yield any money to satisfy the judgment, since the seized bank account contained no funds. After the appeals court affirmed, the Supreme Court reversed holding that "the legislature has expressly stated that once a writ of fieri facias, a writ of seizure and sale, or any conservatory or other writ under which property may be seized is issued, and a sheriff obtains possession of it, his right to collect a commission on the payment made to the plaintiff in writ attaches." *Tucker*, *supra* at 720. Moreover,

the Court declared that "With regard to which party is liable for payment," the language of LSA-R.S. 33:1428(A)(13)(c) "makes the plaintiff in writ unquestionably liable for both fees and the commission." *Id.*

Valdez argues that *Tucker* is not applicable, since the plaintiff, Tucker, did not move to tax costs. We believe *Tucker* is distinguishable since the plaintiff, Tucker, executed a satisfaction of judgment before the sheriff moved to tax costs.

We find no error in the trial court's judgment, taxing the cost of the sheriff's fee and commission against the defendants.

SECOND ASSIGNMENT OF ERROR: The trial court erred by failing to find that the sheriff's commission for the non-resident attachment violated the United States Constitution's Commerce Clause, Article 1, Section 8, Clause 3.

In opposition to the sheriff's motion to tax cost, defendants argued in their memorandum that the fee and commission were an unconstitutional tax on interstate commerce in violation of the United States Constitution. Although there is no single procedure or type of proceeding for challenging the constitutionality of a statute, the longstanding jurisprudential rule is that the statute must first be questioned in the trial court and the unconstitutionality of the statute must be specifically pleaded. *Rodgers v. James River II, Inc.*, 94-1807 (La.App. 4 Cir. 9/28/95), 661 So.2d 173, 176, *citing Vallo v. Gayle Oil Co., Inc.*, 94-1238 (La. 11/30/94), 646 So.2d 859, 864-65. Accordingly, the

unconstitutionality of a statute must be specifically pleaded in a petition, an exception, a motion, or answer and "cannot be raised in a memorandum, opposition or brief as those documents do not constitute pleadings." *Id.* Moreover, although the attorney general is not an indispensable party, he should be served a copy of the pleading, contesting the constitutionality of a statute. *Id.* The constitutionality of the statute is not in a proper posture for this court's review. The defendants raised the question of constitutionality in a memorandum in opposition to the sheriff's motion to tax cost. In addition, the defendants did not serve or notify the Attorney General of the constitutional challenge, so that the Attorney General could elect whether or not to exercise his statutory right to represent the state's interest in the proceeding. LSA-R.S. 49:257(B).

THIRD ASSIGNMENT OF ERROR: The trial court erred by awarding Valdez costs, totaling $49,979.81.

Defendants complain that the trial court erred by awarding costs to Valdez for various witness fees and expenses. Such awards of costs are reviewed for an abuse of discretion by the trial court. *Bergman v. Nicholson Management and Consultants, Inc.*, 594 So.2d 491, 500 (La.App. 4 Cir. 1992).

Defendants complain about the award of costs associated with several expert witnesses. LSA-R.S. 13:3666 provides, in pertinent part;

> A. Witnesses called to testify in court only by an opinion founded on special study or

experience in any branch of science, or to make scientific or professional examinations, and to state the results thereof, shall receive additional compensation, to be fixed by the court, with reference to the time employed and the degree of learning or skill required.

B. The court shall determine the amount of the **fees** of said expert witnesses which are to be taxed as costs to be paid by the party cast in judgment either:

(1) From the testimony of the expert relative to his time rendered and the cost of his services adduced upon the trial of his cause, outside the presence of the jury, the court shall determine the amount thereof and include same.

(2) By rule to show cause brought by the party in whose favor a judgment is rendered against the party cast in judgment for the purpose of determining the amount of the expert fees to be paid by the party cast in judgment, which rule upon being made absolute by the trial court shall form a part of the final judgment in the cause.

C. In either manner provided in Subsection B, the court shall also determine and tax as costs, to be paid by the party cast in judgment, the reasonable and necessary cost of medical reports and copies of hospital records.

[Emphasis added.]

Appendix A

Defendants complain about the excessiveness of the award for Dr. Michael Howard's expert witness fee for trial in the amount of $6,566.00. Factors to be considered by the trial judge in setting an expert witness fee include time spent testifying, time spent in preparatory work for trial, time spent away from regular duties while waiting to testify, the extent and nature of the work performed, and the knowledge, attainments and skill of the expert. *Albin v. Illinois Central Gulf Railroad*, 607 So.2d 844, 845-846 (La.App. 1 Cir. 1992). Additional considerations include helpfulness of the expert's report and testimony to the trial court, the amount in controversy, the complexity of the problem addressed by the expert and awards to experts in similar cases. *Id.* Dr. Howard stated, without objection by the defendants, that the fee for his trial testimony totaled $2,500.00 and that he spent twenty-three hours, at $175.00 per hour, reviewing medical records in preparation for trial. After reviewing the record, we find no evidence from which to conclude that the trial court abused its discretion in awarding as cost $6,566.00 for Dr. Howard's fee.

Defendants complain that the trial court erred in awarding plaintiff the cost, associated with the fees and expenses, of Dr. Eduardo Maaba. The trial court awarded Valdez $1,500.00 for Dr. Maaba's fee and $2,808.77 for his travel expenses. Defendants complain that Dr. Maaba's deposition should have been used in place of live testimony, that plaintiff could have used a local expert in psychiatry, and that the award was excessive. We find no authority for the requirement that a party substitute a deposition for a witness's testimony at trial. However, because there is no statutory authority for the award of the travel expenses of foreign witnesses, we reverse that

portion of the award of the cost of Dr. Maaba's trip from the Philippines. *Myers v. Broussard*, 96-1694 (La.App. 3 Cir. 5/21/97), 696 So.2d 88, 102, *citing Rebowe v. Hines*, 343 So.2d 351, 353 (La.App. 4 Cir. 1977). We find no error in the trial court's award of Dr. Maaba's fee.

Defendants argue that the trial court erred in the award of costs associated with the testimony of Dr. Eugenio Alcazaren. The trial court awarded Valdez $4,054.00 as Dr. Alcazaren's witness fee and travel expenses. Dr. Alcazaren traveled from Florida to testify at trial. Although we are not convinced from the record that the trial court abused its discretion in awarding Valdez the cost of Dr. Alcazaren's fee, we do not believe any statutory authority exists for the award of the travel expenses of a foreign witness. *Myers*, *supra* at 102. We do not believe the trial court abused its discretion in awarding Valdez the cost of Dr. Alcazaren's fee, totaling $3,425.00. We amend the judgment to reduce the award by the travel expenses of $629.00.

Defendants complain that the cost of the fee awarded for the testimony of Dr. Jerry Householder was excessive. After reviewing the record, we do not find that the trial court abused its discretion in awarding this expert's fee, totaling $3,000.00, for his preparation and testimony at trial.

Defendants argue that the trial court abused its discretion in awarding Elizabeth Tan's fee, $750.00, and travel expenses, $2,808.77, for her testimony at trial.[3] For the above

3. In the trial court judgment, this witness is referred to as Sylvia Tan, but in every other portion of the record she is referred to as Elizabeth Tan.

reasons, we reverse the judgment awarding the travel expenses of this foreign witness. However, we affirm the award of this witness' fee.

We are asked to reverse the award of travel expenses associated with a trip by two expert witnesses to the Philippines in preparation for trial. We find no statutory authority for the award of travel expenses of expert witnesses. LSA-R.S. 13:3666 and *Myers*, *supra* at 101. We reverse the judgment awarding Valdez the costs of Dr. Howard's trip to the Philippines, or $2,670.00, and Dr. Alcazaren's trip to the Philippines, or $4,036.00.

Defendants complain that the trial court erred in awarding costs for reports prepared by Dr. Howard in February 1994, before Valdez filed suit, and April 1995. Because the record convinces us that Dr. Howard prepared these reports as part of Valdez' "medical examination and treatment,"[4] we believe the trial court abused its discretion awarding the cost of these reports to Valdez. *Dyson v. Travelers Insurance Company*, 256 So.2d 468, 469 (La.App. 4 Cir. 1972). Therefore, we reverse the judgment, in part, reducing the award of costs by the expense of these reports, $4,429.15.

CONCLUSION

For the reasons discussed above, we reverse the judgment in part and affirm in part. We affirm the judgment awarding the sheriff an amount, totaling $293,600.34, against

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4. Valdez does not contest this fact.

defendants. We reverse that portion of the award of the cost of Dr. Maaba's trip from the Philippines, an amount totaling $2,808.77. We amend the judgment to reduce the award by the travel expenses of $629.00. We reverse the judgment awarding the travel expenses of Elizabeth Tan, a foreign witness, in amount totaling $2,808.77. We reverse the judgment awarding Valdez the costs of Dr. Howard's trip to the Philippines, or $2,670.00, and Dr. Alcazaren's trip to the Philippines, or $4,036.00. We reverse the judgment, in part, reducing the award of costs by the expense of these reports, $4,429.15.

REVERSED IN PART AND AFFIRMED IN PART

APPENDIX B — LETTER ORDER OF THE COURT OF APPEAL FOR THE FOURTH CIRCUIT, STATE OF LOUISIANA REFUSING REHEARING DATED MAY 15, 2001

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, MAY 15 2001

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

NESTOR ABUAN, ET AL V. SMEDVIG TANKSHIPS, LTD., ET AL

No. 2000-CA-1120

Very Truly yours,

DANIELLE A. SCHOTT
CLERK OF COURT

APPENDIX C — JUDGMENT OF THE 25TH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES, STATE OF LOUISIANA DATED AND FILED SEPTEMBER 10, 1999

25TH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

DOCKET NO. 38-719

DIVISION "B"

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL

FILED: SEP 10 1999 /s/ [illegible]
DEPUTY CLERK

JUDGMENT

This matter came to be heard pursuant to a Motion to Tax Costs by Nestor Abuan, as guardian on behalf of Carlos Valdez, and I.F. "Jeff" Hingle, Sheriff of Plaquemines Parish. The Court, having considered the entire record of this proceeding, the memoranda of all parties, and having considered the law and the evidence to be in favor thereof, rules as follows:

Appendix C

IT IS ORDERED, ADJUDGED AND DECREED that the Motion to Tax Costs by Nestor Abuan, as guardian on behalf of Carlos Valdez, be and is hereby taken under advisement.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered in favor of I.F. "Jeff" Hingle, Sheriff of Plaquemines Parish and against defendants, Smedvig Tankships, Ltd., Smedvig Tankships (Agencies) Ltd., Smedvig Tankships Management, Ltd., Smedvig Tankships, A.S., a/k/a Smedvigs Tankrederi, A.S., Peder Smedvig, A.S., Peder Smedvig Singapore PTE, Ltd., K.S. Smedvig Tankers V, and K.S. Smedvig Tankers, VI, for a commission of six percent (6%) of the principal amount of the judgment rendered in this proceeding pursuant to La. R.S. 33:1428.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the principal amount of the judgment is fixed at $4,893,339.00 (the Judgment rendered on January 31, 1996 of $5,042,563.00 less the modification by the Court of Appeal for the Fourth Circuit in the amount of $149,224.00) and, accordingly, judgment is hereby rendered in favor of I.F. "Jeff" Hingle, Sheriff of Plaquemines Parish and against the defendants in the amount of $293,600.34.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Judgment awarding Sheriff I.F. "Jeff" Hingle his statutory commission shall bear legal interest from January 31, 1996 and the defendants shall bear all costs of this Motion.

Appendix C

THUS DONE AND SIGNED in Pointe-A-La-Hache, Louisiana on this 10th day of September, 1999.

/s/ William A. Roe
JUDGE, 25TH JUDICIAL
DISTRICT COURT

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF LOUISIANA DENYING APPLICATION FOR WRIT OF CERTIORARI DATED SEPTEMBER 28, 2001

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 2001-C-1752

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ

VS.

SMEDVIG TANKSHIPS, LTD. ET AL.

IN RE: Smedvig Tankships Ltd. etal; K.S. Smedvig Tankers V; Smedvig Tankship Management Ltd.; Smedvig Tankships A.S. a/k/a; Smedvig Tankrederi A.S.; Peder Smedvig A.S.; Peder Smedvig Singapore Pte. Ltd.; K.S. Smedviog Tankers VI; Smedvig Tankships (Agencies) Ltd.; — Defendant(s); Applying for Writ of Certiorari and/or Review, Parish of Plaquemines, 25th Judicial District Court Div. B, No. 38-719; to the Court of Appeal, Fourth Circuit, No. 2000-CA-1120

September 28, 2001

Denied.

Appendix D

PFC

CDK

BJJ

JPV

CDT

JTK

RLL

Supreme Court of Louisiana
September 28, 2001

/s/ [illegible]
Deputy Clerk of Court
For the Court

APPENDIX E — EXCERPTS FROM MEMORANDUM IN OPPOSITION TO MOTION FOR TAX COSTS AND SHERIFF'S COMMISSION DATED JULY 16, 1999

25TH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

DOCKET NO. 38-719

DIVISION "B"

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL

MEMORANDUM IN OPPOSITION TO MOTION OF PLAINTIFF AND SHERIFF TO TAX COSTS AND SHERIFF'S COMMISSION

* * *

Had the Louisiana legislature drafted this statute so as to permit recovery of the commission against a non-resident defendant where a writ of non-resident attachment was obtained, an unconstitutional taking would occur. A writ of non-resident attachment can issue only against non-residents. Thus, Louisiana residents would never shoulder the burden of this onerous commission. In essence, only non-residents would be "taxed" for the privilege of being sued in Louisiana courts. Such a tax would violate the United States Constitution's Commerce Clause, Article 1, Section 8, Clause 3.

Appendix E

It is recognized that not all state taxes on interstate commerce are invalid. However, those which cannot satisfy tests of fairness and reasonable relation are invalid:

> "Prior case law has established that a state tax is not per se invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way. . . . The State's right to tax interstate is limited, however, and no state tax may be sustained unless the tax: (1) has as substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state.

Maryland v. Louisiana, 451 U.S. 725, 753, 101 S.Ct. 2114, 68 L.Ed.2d 576, 600.

In *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992), the United States Supreme Court struck down Alabama's disposal fee imposed on hazardous waste generated out of the state but not on waste generated in the state. In so doing, the court stated:

> "The Act's additional fee facially discriminates against hazardous waste generated in States other than Alabama. . . . Such burdensome taxes imposed on interstate commerce alone are generally forbidden: 'A State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely

> within the State.'. . . . **Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry**. *Chemical Waste Management v. Hunt*, 504 U.S. at 342, 119 L.Ed.2d at p. 132. (Citation omitted)

Applying the foregoing to the subject facts, a sheriff's tax on non-resident defendants for the issuance of writs of non-resident attachment is unconstitutional. Applying the United States' four part test, at least three of the conjunctive factors have been violated:

(1) The tax discriminates against interstate commerce in this case where a writ of non-resident attachment issued. By definition, a non-resident attachment cannot issue against a resident. Therefore, resident defendants would always be spared the tax, while non-resident defendants would not.

(2) The tax is not fairly related to the services provided by the state. In the subject case, the sheriff served a writ of non-resident attachment on a vessel master, telephoned the pilot's association to restrict the vessel, and five days later telephoned the pilot's association to release the vessel from attachment. For this, the sheriff seeks a 6% commission on a $4,955,673 judgment – almost $300,000! Under no circumstances can such a tax imposed only against non-resident defendants

be substantiated as fairly related to the level of service provided.[3]

(3) The tax is not fairly apportioned. As indicated above, under the sheriff's interpretation of the law, only non-residents would pay the tax in cases where writs issued for non-resident attachment. Under the facts of this case, the sheriff would reap a sum approximating one-third of its entire annual operating budget for *all* operations from an entity not benefitting, at all, from the service provided. (See Budget; Exhibit "A"). It is only the plaintiff who benefits from this service.

To withstand constitutional scrutiny, the tax must satisfy all four Supreme Court factors. At most, the tax satisfies one. Accordingly, it is unconstitutional if it is applied to non-resident defendants subject to writ of non-resident attachment.

* * *

3. Indeed, the defendants do not benefit from any state services when their property engaged in international commerce is seized on the Mississippi River for a cause of action having nothing to do with the property or the state of Louisiana. The only one who benefits is the plaintiff, and he is the one the Act obligates to pay.

Appendix E

Respectfully submitted:

TERRIBERRY, CARROLL &
YANCEY, L.L.P.

/s/ Laurence R. DeBuys, IV
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Peder Smedvig Singapore, Pte., Ltd.,
K.S. Smedvig Tankers V, and
K.S. Smedvig Tankers VI

* * * *

APPENDIX F — EXCERPTS FROM SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION FOR TAX COSTS AND SHERIFF'S COMMISSION DATED SEPTEMBER 3, 1999

25TH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

DOCKET NO. 38-719

DIVISION "B"

NESTOR ABUAN, AS GUARDIAN ON
BEHALF OF CARLOS VALDEZ

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION OF PLAINTIFF AND SHERIFF TO TAX COSTS AND SHERIFF'S COMMISSION

* * *

LAW AND ARGUMENT

* * *

III. *The Commission Cannot Be Constitutionally Taxed Against Non-Resident Defendants*

Since briefing the constitutional issues in the July 16, 1999 memorandum (Exhibit "D"), two pertinent facts have come to light:

Appendix F

1. According to the stipulated testimony of Sheriff Hingle, his office incurred total expenses of only $1,260 in connection with all vessel attachment activities related to this case (Exhibit "F").

2. The sheriff's entire expended operating budget for the year 1998 was $821,688.51 (Exhibit "G").[4]

Thus, an award of roughly $300,000 against defendants would be grossly disproportionate to the services given that such figure is:

1. 238 times the cost of the services provided;

2. Over 1/3 of the sheriff's entire operating budget for an entire year.

Such a grossly disproportionate "commission" assessed only against non-residents in the case of non-resident attachment is violative of the constitution. *See, Maryland v. Louisiana*, 451 U.S. 725, 753, 101 S.Ct. 2114, 68 L.Ed. 2d 576, 600 (1981); and, *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (112 S.Ct. 2009), 119 L.Ed. 2d 121 (1992):

> Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry.

---

4. Movants have agreed to produce the 1994 operating budget for submission with Sheriff Hingle's stipulation.

Hunt, 504 U.S. at 342, 119 L.Ed.2d at p. 132. The commission should not be assessed against defendants on this basis as well.

* * *

Respectfully submitted:

TERRIBERRY, CARROLL &
YANCEY, L.L.P.

/s/ Laurence R. DeBuys, IV
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Smedvig Tankships (Agencies), Ltd.,
Smedvig Tankships Management, Ltd.,
Smedvig Tankships, A.S., a/k/a Smedvig
Tankrederi A.S., Peder Smedvig, A.S.,
Peder Smedvig Singapore, Pte., Ltd.,
K.S. Smedvig Tankers V, and
K.S. Smedvig Tankers VI

* * * *

Appendix F

EXHIBIT "F"

25TH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

DOCKET NO. 38-719

DIVISION "B"

NESTOR ABUAN, AS GUARDIAN ON
BEHALF OF CARLOS VALDEZ

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL

STIPULATION

NOW COME plaintiff, Nestor Abuan, and defendants, Smedvig Tankships, Ltd., Smedvig Tankships (Agencies), Ltd., Smedvig Tankships Management, Ltd., Smedvig Tankships, A.S., a/k/a Smedvig Tankrederi A.S., Peder Smedvig, A.S., Peder Smedvig Singapore, Pte., Ltd., K.S. Smedvig Tankers V, and K.S. Smedvig Tankers VI, who stipulate that if Sheriff I.F. "Jeff" Hingle were called to testify at the hearing on motion to tax costs, his testimony would be consistent with the information and facts set forth in the attached August 31, 1999 correspondence from Mr. Darren D. Sumich to Mr. L. R. DeBuys. The parties agree to accept this correspondence as if it were the sheriff's testimony offered in open court in order to avoid disrupting the Court's schedule and requiring the live appearance of the sheriff at hearing.

Appendix F

THUS DONE AND EXECUTED, this 9th day of September, 1999.

COSSICH, MARTIN & SUMICH

/s/ Darren D. Sumich
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DARREN D. SUMICH (# 23321)
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Attorneys for Nestor Abuan, as Guardian on Behalf of Carlos Valdez

TERRIBERRY, CARROLL & YANCEY, L.L.P.

/s/ Laurence R. DeBuys, IV
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Appendix F

EXHIBIT "G"

COSSICH, MARTIN, SUMICH & PARSIOLA, L.L.C.
Attorneys at Law
8056 Highway 23
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Post Office Box 400
Belle Chasse, Louisiana 70037

August 31, 1999

VIA FAX – (504) 524-3257

Larry DeBuys, Esq.
TERRIBERRY, CARROLL & YANCEY
3100 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163-3100

Re: 38-719 Nestor Abuan, as Guardian on Behalf of Carlos Valdez vs. Smedvig Tankships, Ltd., et al

Dear Larry:

As per our previous discussions regarding the Plaquemines Parish Sheriff's office, please review the following. Perhaps we can stipulate to these facts to avoid calling any witnesses at the trial of this matter. I have organized the facts in the number order of your questions contained in previous correspondence. We can reorganize them if needed.

1. Attached please find a computerized printout of all PPSO costs and expenses attributed to the above

referenced matter. It lists all costs per service, deposits of funds in case, and all other expenses.

2. The attached printout referenced above gives a brief outline of the time devoted. The Plaquemines Parish Sheriff's Office (PPSO) received the Writ of Attachment on August 22, 1994. It was typed, processed, and seized on the same day. The seizure was effected at approximately 4:00 p.m. the same day and a deputy was posted on the ship at this time. With the exception of the initial seizure, the deputies worked in twelve hour shifts. I have listed below the deputies who worked and the times.

Deputy	**Date & Time**	**Costs**
Louis J. Moore, Jr.	8/22 4:00 p.m. – 12:00 a.m.	$120.00
Steve Zegura	8/23 12:00 a.m. – 12:00 p.m.	$180.00
Timothy Arceneaux	8/23 12:00 p.m. – 12:00 a.m.	$180.00
Carl Chartier	8/24 12:00 a.m. – 12:00 p.m.	$180.00
Jessie Ledet	8/24 12:00 p.m. – 12:00 a.m.	$180.00
Steve Vaughn	8/25 12:00 a.m. – 12:00 p.m.	$180.00
Mike Etienne	8/25 12:00 a.m. – 12:00 p.m.	$180.00
Kevin Wilson	8/26 Stand By	$60.00
TOTAL:		$1,260.00

The ship seizure was canceled during the morning shift of August 25th.

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3. All costs were broken down on the computerized print out as to service costs and security detail. There were no costs for transportation to ship, nor any other additional costs charged to the suit. The does not include the PPSO's statutory commission.

4. Please find a copy of the PPSO's Budget attached for the year during which the seizure occurred.

5. Records showing the amount of the budget attributable to all vessel attachment activities that year cannot be given because the financial statements do not separate seizure revenues by the item seized. We do not allocate the budget in this manner as we have no way of knowing how many seizures will occur during a given time period.

6. The accounting records showing time and expenses attributable to the attachment of M/V VENITA are contained within the attached and above referenced computerized printout. All funds received and all funds expended are listed.

Additional Questions:

1. When the sheriff's office received the VENITA order of attachment, a call was made to the Pilot's Association to check the position of the vessel. A record of the exact time and duration of the call is not kept, but it normally does not take a long period of time. No correspondence was sent to the Pilot's Association. All contact was performed by telephone.

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This seizure was typed, processed and served all on the same day.

Deputy Louis J. Morel, Jr. posted the vessel on the 22nd and the Captain G . Nilsen was served also at the same time. The seizure took place at approximately 4:00 p.m.

A fax received at 10:36 a.m. on the 25th of August, 1994 was the precipitating even for the release of the vessel. The deputy on board was notified by radio and transportation was sent to pick him up. The deputies who were scheduled to work were notified of the cancellation of the seizure. No other time log on the release was kept other than what has already been attached.

2. When the sheriff's office received the order releasing the attachment, a phone call was made to the Pilot's Association. The time and duration of this call was not recorded. There was no written correspondence to the Pilot's Association concerning the release.

4. The actual expenses incurred by the PPSO in attaching the VENITA, maintaining her under attachment and releasing her from attachment are show above. The costs are broken down on the printout for each service and each deputy. The rate on each detail was fifteen dollars per hour. The rest of the processing was done by office staff and was part of their normal job description and pay.

Appendix F

5-6. The PPSO budget is not set up in a manner to calculate the total amount of the budget designated to fund expenses in attaching vessels. This is because the PPSO has no way of calculating how many ship seizures we will receive in a fiscal period. A copy of the budget for 1994 is attached.

7. The PPSO commission for the sale of property seized or attached is typically paid from the proceeds resulting from the sale or other adjudication of the items seized.

Please contact me upon your review of this information. I have attached the expense sheet referenced above. I am still awaiting a copy of the PPSO budget. However I don't foresee any problem with receiving this document as it has been explained to me that it is public record and anyone may receive it.

Sincerely yours,

/s/ Darren D. Sumich

Philip F. Cossich, Jr.
Darren D. Sumich

PFC/lmb
Enclosure
cc: Richard J. Dodson, Esq. – via fax – (225) 336-0330

APPENDIX G — EXCERPTS FROM BRIEF OF APPELLANTS DATED JUNE 12, 2000

STATE OF LOUISIANA
COURT OF APPEAL, FOURTH CIRCUIT

NO. 2000-CA-1120

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ

Plaintiff-Appellee

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL

Defendant-Appellant

ON APPEAL FROM THE
25TH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES, STATE OF LOUISIANA
CIVIL PROCEEDING
THE HONORABLE WILLIAM A. ROE, PRESIDING

BRIEF ON BEHALF OF APPELLANTS,
K.S. Smedvig Tankers V, Smedvig Tankships, Ltd., Smedvig Tankships (Agencies), Ltd., Smedvig Tankships Management, Ltd., Smedvig Tankships, A.S., a/k/a Smedvig Tankrederi A.S., Peder Smedvig, A.S., Peder Smedvig Singapore, Pte., Ltd., and K.S. Smedvig Tankers VI

Appendix G

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* * *

SYLLABUS

* * *

10. A state tax burdening interstate commerce may not be sustained unless the tax: a) has a substantial nexus with the State; b) is fairly apportioned; c) does not discriminate against interstate commerce; and, d) is fairly related to the services provided by the state. *Maryland v. Louisiana*, 451 U.S. 725, 753, 101 S.Ct. 21144, 68 L.Ed. 2d 576, 600 (1981).

11. Where a state fee is found to discriminate against out-of-state commerce, it is typically struck down

without further inquiry. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342, 112 S.Ct. 2009, 119 L.Ed. 2d 121, 132 (1992).

12. A state is not free to impose an unreasonable burden on international commerce. *United States Constitution, Article 1, Section 8, Cl. 3.*

* * *

ISSUES PRESENTED FOR REVIEW

* * *

4. Whether the sheriff's commission constitutionally can be assessed against defendants on a writ of non-resident attachment.

* * *

ARGUMENT

* * *

V. *The Commission Acts as an Unconstitutional Tax When Applied to Non-Resident Defendants*

A writ of non-resident attachment can issue, by definition, only against non-residents. If the Louisiana Legislature drafted the sheriff's "commission" statute so as to permit recovery of the commission against non-resident defendants where a writ of non-resident attachment was obtained, an unconstitutional taking would occur. Louisiana residents would never shoulder the burden of this onerous

commission. In essence, only non-residents would be "taxed" for the privilege of being sued in Louisiana courts. Such a tax would violate the United States Constitution's Commerce Clause, Article 1, Section 8, Clause 3.

It is recognized that not all state taxes on interstate commerce are invalid. However, those which cannot satisfy tests of fairness and reasonable relation are invalid:

> "Prior case law has established that a state tax is not per se invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way. . . . The State's right to tax interstate is limited, however, and no state tax may be sustained unless the tax: (1) has as substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state." *Maryland v. Louisiana*, 451 U.S. 725, 753, 101 S.Ct. 2114, 68 L.Ed.2d 576, 600 (1981).

In *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992), the United States Supreme Court struck down Alabama's disposal fee imposed on hazardous waste generated out of the state but not on waste generated in the state. In so doing, the court stated:

> "The Act's additional fee facially discriminates against hazardous waste generated in States other than Alabama. . . . Such burdensome taxes

> imposed on interstate commerce alone are generally forbidden: 'A State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'. . . . **Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry**. *Chemical Waste Management v. Hunt*, 504 U.S. at 342, 119 L.Ed.2d at p. 132. (Citation omitted; bold added)

Applying the foregoing to the subject facts, a sheriff's tax on non-resident defendants for the issuance of writs of non-resident attachment is unconstitutional. Applying the United States Supreme Court's four part test, at least three of the conjunctive factors have been violated:

(1) The tax discriminates against interstate commerce. By definition, a non-resident attachment cannot issue against a resident. Therefore, resident defendants would always be spared the tax, while non-resident defendants would not.

(2) The tax is not fairly related to the services provided by the state. In the subject case, the sheriff served a writ of non-resident attachment on a vessel master, telephoned the pilot's association to restrict the vessel, and five days later telephoned the pilot's association to release the vessel from attachment. The sheriff's entire cost for effecting the seizure

was $1,260. For this, the sheriff obtained a 6% commission on a $4,955,673 judgment – almost $300,000! The commission taxed is thus over 230 times greater than the sheriff's actual cost. Under no circumstances can such a tax imposed only against non-resident defendants be substantiated as fairly related to the level of service provided.[10]

(3) The tax is not fairly apportioned. As indicated above, under the district court's interpretation of the law, only non-residents would pay the tax in cases where writs issue for non-resident attachment. Under the facts of this case, the sheriff would reap a sum approximating one-third of it entire annual operating budget for *all* operations from an entity not benefitting, at all, from the service provided. It is only the plaintiff who benefits from this service.

To withstand constitutional scrutiny, the tax must satisfy all four Supreme Court factors. At most, this commission satisfies one. Accordingly, it is unconstitutional if it is applied to non-resident defendants subject to a writ of non-resident attachment.

If the commission is assessed only against the plaintiff in writ, as is specified by both the Act itself and the Louisiana

10. Indeed, the defendants do not benefit from any state services when their property engaged in international commerce is seized on the Mississippi River for a cause of action having nothing to do with the property or the state of Louisiana.

Supreme Court, the commission does not run afoul of many of the commerce clause factors. More specifically, resident and non-resident plaintiffs have equal access to the writ procedure and knowledge, in advance, that they will be responsible for the sheriff's lien. Applied in this fashion, resident plaintiffs do not obtain inequitable advantages over non-resident plaintiffs where a non-resident attachment is effected.[11]

The sheriff attempted to avoid the constitutional prohibitions by arguing that the "commission" is not a "tax". This is a distinction without a difference, and constitutional prohibitions cannot be avoided merely by calling a "tax" a "commission". Indeed, in *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992), the Supreme Court struck down as unconstitional a waste disposal "fee" imposed by the State of Alabama on "non-resident" waste. The "fee" was treated as a "tax". The sheriff's "commission" appearing in a statute entitled "Fees in Civil Matters" should receive similar treatment.

* * *

---

11. Even applied in this fashion, defendants submit a commission of roughly $300,000 for less than 3 hours work is an unconstitutional taking and an impermissible fine or penalty. The statute should be read to avoid such a result and it can be. It provides "Sheriffs shall be entitled *to no more than* the following . . . compensation." It thereafter states permissively that a "six percent commission shall be *allowed*." Thus, the statute sets a ceiling – not a floor.

Appendix G

Respectfully submitted:

TERRIBERRY, CARROLL
& YANCEY, L.L.P.

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Tankrederi A.S., Peder Smedvig, A.S.,
Peder Smedvig Singapore, Pte., Ltd.,
and K.S. Smedvig Tankers VI

* * * *

APPENDIX H — APPLICATION FOR REHEARING DATED APRIL 24, 2001

STATE OF LOUISIANA
COURT OF APPEAL, FOURTH CIRCUIT

NO. 2000-CA-1120

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL

APPLICATION FOR REHEARING

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Appendix H

APPLICATION FOR REHEARING

Appellants Smedvig Tankships, Ltd., Smedvig Tankships (Agencies), Ltd., Smedvig Tankships Management, Ltd., Smedvig Tankships, A.S., a/k/a Smedvig Tankrederi A.S., Peder Smedvig, A.S., Peder Smedvig Singapore, Pte., Ltd., K.S. Smedvig Tankers V, and K.S. Smedvig Tankers VI seek a rehearing by this Court for the following reasons:

a. The Court did not consider defendants' constitutional arguments on the merits, believing there was a failure to raise and address such arguments appropriately in the trial court. However, defendants undertook appropriate steps to raise constitutional issues in the trial court, thus qualifying such issues for consideration by this Court.

b. Because defendants were diligent in the raising of constitutional defenses, it is appropriate to remand this action to the trial court for further constitutional review, rather than forego consideration of the constitutional defenses, if the Court believes the case is not in a proper posture for appellate review.

c. Defendants' constitutional defenses remain meritorious, despite arguments made by plaintiff's counsel at the hearing of the appeal.

Appendix H

ARGUMENT

a. *Defendants Raised the Constitutional Issues Appropriately Under the Facts of This Case*

In its reasons for judgment on original hearing, this Court declined to consider defendants' constitutional attack on the Sheriff's Commission for the following reasons:

1. The unconstitutionality of the statute was not specifically pled in a petition, exception, motion or answer;

2. The Attorney General was not served with a copy of the pleading contesting the constitutionality of the statute.

It is respectfully submitted this Court erred in applying an unreasonably rigid standard to defendants' constitutional challenge under the facts of this case.

1. *The Constitutional Challenge was Raised Appropriately*

With respect to the first justification for declining review, it is admitted a longstanding jurisprudential rule exists. Constitutional issues must be raised appropriately in the trial court before appellate consideration is sought. It is denied the rule contains an inflexible, technical requirement that the constitutional challenge be set forth in a pleading as defined in Article 852 of the Louisiana Code of Civil Procedure. Many of the Louisiana Supreme Court's earlier

decisions make no reference to a restrictive "pleading" requirement, but merely require that the issue be "raised" in the lower court. Other decisions have commented, in passing, that the issue should be raised by pleading or otherwise in the trial court. For example, in *Allopathic State Board of Medical Examiners v. Fowler*, 50 La. Ann. 1358, 24 So. 809 (La. 1898), the court stated:

> In *State v. St. Romes*, 26 La. Ann. 754, we held that the constitutionality of a law would not be considered when an issue to that effect has not been raised in the case below. The same rule applies to cases where special grounds of unconstitutionality are set up for the first time in this court, and particularly those where an examination of evidence would be needed for a decision of the questions submitted. . . .

Allopathic, *supra*, 50 La.Ann. 1358, 24 So. 809, 812 (La. 1898). To similar effect, the Supreme Court stated in *Scovell v. St. Louis Southwestern R. Co.*, 114 La. 847, 38 So. 582 (La. 1905):

> Under the jurisprudence the questions of unconstitutionality should always be presented before the court of original jurisdiction. They should not be raised for the first time on appeal.

Scovell, *supra*, 38 So. 582, 583-584, (La. 1905). *See also, State ex rel. People's Fire Ins. Co. of New Orleans v. Michel*, 125 La. 55, 51 So. 66, 69 (La. 1909). Similarly, in *Saint v. Martel*, 53 So. 432 (La. 1910), the court stated:

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> The suggestion, made for the first time in the oral argument in this court, that the statute thus cited is unconstitutional, cannot be entertained. Defendant had the opportunity to raise the question in the district court, and having failed to do so, cannot be heard to raise it here. . . .

Saint, supra, 127 La. 73, 53 So. 432, 437, (La. 1910).

This jurisprudential rule is not inflexible, and should be interpreted to do substantial justice. Like any rule, it is subject to exception. *See, Summerell v. Phillips*, 258 La. 587, 247 So.2d 542 (La. 1971). Boiled down to its essentials, the Supreme Court's concern is that constitutional issues be set forth with specificity in the trial court so that they may be fairly addressed before resort to the Court of Appeal. In *City of New Orleans v. Plotkin*, 205 La. 490, 17 So.2d 719 (La. 1944), the court stated:

> The plea, in this instance, is too vague to put at issue the unconstitutionality of the law attacked. The court cannot be expected to make an examination to ascertain the various laws under which plaintiff may have acted and to ascertain wherein they violate the due process clause of the Constitution of the United States, or are otherwise unconstitutional, and, if they are, in what respect they are so, nor can the opposite party to the litigation, under these circumstances, be expected to meet the attack, for he is not sufficiently informed by the plea to undertake the task, and

> moreover, the burden is not upon him to show that they are constitutional. . . .

Plotkin, supra, 17 So.2d 719 721 (La. 1944).

Under the instant facts, defendants raised their constitutional attack on the first possible occasion – their January 25, 1999 memorandum in opposition to the sheriff's motion to tax costs. It was not until the sheriff filed his motion on January 15, 1999 that defendants were faced with an unconstitutional act. Defendants' January 1999 memorandum clearly set forth the basis of the constitutional attack. The memorandum not only cited applicable United States Supreme Court law, but specifically referenced the United States Constitution's Commerce Clause, Article 1, Section 8, Clause 3. Defendant's constitutional attack was further addressed in supplemental memoranda filed on July 16 and September 3, 1999.

Hearing on the sheriff's motion to tax costs was conducted on September 7, 1999. It was continued to that date from an earlier August 3, 1999 date so that defendants could obtain testimony from the sheriff for use at the hearing. A subpoena was issued requiring the sheriff's attendance at the hearing to obtain testimony in support of the constitutional arguments. In consideration of the Court's and the sheriff's time, the parties agreed to stipulate to the sheriff's testimony. This testimony (by stipulation) was directed almost exclusively to facts in support of the constitutional argument, i.e., the sheriff should not be paid almost $300,000 for performing $1,200 worth of work. The parties orally argued the case, and the judge thereafter entered judgment after considering this evidence.

Appendix H

Against this set of facts, it is clear the constitutional issues were fully and fairly addressed in the trial court. No party legitimately could claim surprise given thorough briefing of the constitutional issues. Indeed, the only testimony presented at the hearing, that from Sheriff Hingle, pertained almost exclusively to the constitutional issues. Thus, the constitutional issues were sufficiently raised before the trial court, and are properly before this Court for review.

Technical adherence to a "pleading" requirement, i.e., that the constitutional defenses be asserted in a petition or answer, simply does not promote justice in this case. First, the issues were as fully identified and litigated in the state court action as if they were included in a pleading defined in Article 852 of the Louisiana Code of Civil Procedure. Second, defendants cannot identify a pleading within the confines of this case in which they logically could have asserted the constitutional defenses. At the time the judgment was rendered on the main demand in January 1996, the law clearly provided that the plaintiff in writ was responsible for the sheriff's commission. It is untenable to suggest the defendants were required, in their answer, to state something akin to

> "defendants are not negligent or otherwise at fault for plaintiff's accident. In the event they are cast in judgment and the sheriff intervenes to tax against them a commission due from the plaintiff in writ, they contend any such future conduct by the sheriff would be unconstitutional as applied to them."

It is respectfully submitted such foresight should not be presumed or required.

The entity receiving the commission, the sheriff, was not even a party to this suit at the time of its filing. He did not surface in this litigation until January 1999, when he filed his motion requesting his commission from the defendants. Louisiana's procedural rules do not provide for an Article 852 "pleading" in response to the sheriff's motion. The defendants availed themselves of the only "responsive pleading" available to such motion – a memorandum in opposition. Because defendants timely raised their constitutional defenses in this first responsive pleading, and indeed in every one thereafter, they have suitably protected their right to argue the constitutional issues before this Court.[1]

2. *Defendants Were Not Required to Notify the Attorney General*

The Court contends defendants failed to notify the Attorney General of their constitutional arguments, thus preventing appellate review. Defendants respectfully submit this conclusion is erroneous.

Article 1880 of the Louisiana Code of Civil Procedure requires the notification of the Attorney General of a constitutional attack on a statute. This article is contained within the section of the Code of Civil Procedure addressing Declaratory Judgment actions. Because the plaintiff's original

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1. Article 1154 of the Louisiana Code of Civil Procedure specifies that pleadings are deemed amended to include issues which are tried by express or implied consent of the parties, even when not specifically raised in the pleadings. Defendants respectfully submit the September 1999 hearing before Judge Roe expanded the pleadings to include the constitutional issues.

action and the sheriff's motion to tax costs do not constitute Declaratory Judgment actions, it is respectfully submitted this article is inapplicable to this case.

Louisiana Revised Statute 49:257(B) discusses the authority of the Attorney General, at his discretion, to participate in any action where the constitutionality of a state statute is challenged. Nowhere does the statute allocate the responsibility for notifying the Attorney General of the constitutional challenge. Louisiana Revised Statute 13:4448 contains a notice requirement, and specifies the Courts of Appeal and the Supreme Court of Louisiana must notify the Attorney General of proceedings attacking the constitutionality of a statute prior to adjudication. Defendants have been unable to find any statute or code article placing upon them the duty to notify the Attorney General of their constitutional attacks.[2]

b. *Remand is Appropriate if the Constitutional Issues are Not Sufficiently Before the Court*

If, after considering the above, the Court still concludes the constitutional issues are not ripe for appellate review, defendants ask the Court to remand this action to the trial court for further consideration. The Court is authorized to grant this relief pursuant to Article 2164 of the Louisiana Code of Civil Procedure, which specifies in pertinent part:

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2. Defendants do not deny it would be a good practice to notify the Attorney General. However, in the absence of a statute or code article specifically requiring defendants to do so, defendants should not lose the right to appellate review of their constitutional arguments.

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> The Appellate Court shall render any judgment which is just, legal, and proper upon the record on appeal. . . .

On more than one occasion the Louisiana Supreme Court has remanded constitutional issues "for the ends of justice" pursuant to this article. *See, Summerell v. Phillips*, 247 So.2d 542, 548 (La. 1971); and, *Scorrell v. St. Louis Southwestern Co.*, 114 La. 847, 38 So. 582 (1905).

c. *The Constitutional Defenses are Meritorious Despite Plaintiff's Arguments*

In the event the Court does not remand but instead elects to consider the constitutional issues after notice to the Attorney General, defendants incorporate herein the arguments made in their original brief.

During oral argument, plaintiff stated it was easy for a non-resident defendant to avoid a non-resident attachment – simply appoint an agent for service of process and consent to general jurisdiction in the state. This approach would simply substitute one unconstitutional act for another. *See, Bendix Auto Lite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed. 2d 896 (1988).

In *Bendix*, the court addressed the constitutionality of an Ohio law which tolled the statute of limitations against a non-resident corporation for such period as the corporation was not "present" in the state. The plaintiff defended the statute, stating a defendant could avoid the effects of the statute by appointing an agent for service of process and

submitting to the general jurisdiction of Ohio courts. The Supreme Court concluded the Ohio statute was unconstitutional as an infringement on the Commerce Clause. Addressing the suggestion that the defendant should appoint an agent for service of process, the court stated:

> The State may not withdraw such defenses on conditions repugnant to the Commerce Clause. Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce. The state may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain. . . .

46 US 888, 894, 108 S.Ct. 2218, 2223, 100 L.Ed. 2d 896, 903. Further addressing the issue, the court stated:

> In the particular case before us, the Ohio Tolling Statute must fall under the Commerce Clause. Ohio cannot justify its statute as a means of protecting its residents from corporations who become liable for acts done within the State but later withdraw from the jurisdiction, for it is conceded by all parties that the Ohio Long-Arm Statute would have permitted service on Midwesco through the period of limitations. The Ohio Statute of Limitations is tolled only for those

> foreign corporations that do not subject themselves to the general jurisdiction of Ohio courts. In this manner the Ohio statute imposes a greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulations. . . . The suggestion that Midwesco had the simple alternatives of designating an agent for service of process and its contract with Bendix for tendering an agency appointment to the Ohio Secretary of State is not persuasive. . . . [A] designation with the Ohio Secretary of State of an agent for the service of process likely would have subjected Midwesco to the general jurisdiction of Ohio courts over transactions in which Ohio had no interest. As we have already concluded, this exaction is an unreasonable burden on commerce.

486 U.S. 888, 895, 105 S.Ct. 2218, 2223, 100 L.Ed. 2d 896, 904.

Because one unconstitutional act should not be substituted for another, plaintiff's argument that defendants could have appointed an agent for service of process to avoid attachment is without merit.

Also without merit is plaintiff's statement that the federal court effects non-resident attachment so the state court can as well. This argument ignores the fact that the United States Marshal does not demand a percentage commission on the value of the property attached or adjudicated. Rather, the

Marshal requires a $10,000 deposit which is "drawn down" by the daily expenses incurred. If the attachment is released immediately, the vast majority of the deposit is returned. Nowhere is either party required to pay the Marshal more than the actual expenses incurred. Thus, unlike the Louisiana system, the federal system does not contain a "profit center" wholly unrelated to the value of the services provided.

CONCLUSION

Constitutional issues were not brought into play until January 1999, when the Sheriff first appeared in this litigation through a motion to tax costs. In their initial opposition memorandum and two subsequent memoranda, defendants clearly raised and thoroughly briefed constitutional defenses. The constitutional issues were fully and fairly presented in the trial court, and thus properly are before this Court. The fact that the Attorney General was not notified by defendants does not affect their right to appellate review because there was no law applicable requiring defendants to notify the Attorney General. Indeed, logic would have suggested that the sheriff, intending to support his commission, would notify the Attorney General. Even he did not do so. Because the constitutional issues properly are before this Court, it is respectfully submitted such arguments should be considered on rehearing.

If the Court concludes trial court participation by the Attorney General in the resolution of constitutional issues is required, defendants ask the Court to remand this matter to the trial court for constitutional review, pursuant to the ends of justice. Thereafter, further appellate review can be sought before this Court, if necessary.

Appendix H

Respectfully submitted:

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* * * *

APPENDIX I — EXCERPTS FROM APPLICATION FOR WRIT OF CERTIORARI DATED JUNE 14, 2001

SUPREME COURT
STATE OF LOUISIANA

NO.2001-C-1752

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL

APPLICATION FOR WRIT OF CERTIORARI FROM THE JUDGMENT OF THE HONORABLE WILLIAM A. ROE, DATED SEPTEMBER 10, 1999, IN THE 25TH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINE, NO. 38-719, DIVISION "B", AND THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS, NO. 2000-CA-1120, DATED APRIL 11, 2001, AFFIRMING THE TRIAL COURT'S JUDGMENT

APPLICATION FOR WRIT OF CERTIORARI AND REVIEW FILED ON BEHALF OF

K. S. SMEDVIG TANKERS IV, SMEDVIG TANKSHIPS, LTD., SMEDVIG TANKERS (AGENCIES), LTD., SMEDVIG TANKSHIPS MANAGEMENT, LTD., SMEDVIG TANKSHIPS, A/S, AKA SMEDVIG TANKREDEREI A.S., PEDER SMEDVIG, A.S., PEDER SMEDVIG SINGAPORE, PTE., LTD., K.S. SMEDVIG TANKERS V, and KS SMEDVIG TANKERS VI

Appendix I

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Tankrederi A.S., Peder Smedvig, A.S.,
Peder Smedvig Singapore, Pte., Ltd.,
and K.S. Smedvig Tankers VI

* * *

STATEMENT OF WRIT CONSIDERATIONS

* * *

4. Consideration under Rule X. 1(a)(4) is appropriate given the Court of Appeal's erroneous failure to undertake consideration of defendants' constitutional arguments which would have mandated reversal of the judgment rendered against the defendants.

* * *

Appendix I

ASSIGNMENT OF ERRORS

* * *

3. The trial court erred in rendering judgment against defendants for the sheriff's commission in violation of the United States Constitution's Commerce Clause, Article 1, Section 8, Cl. 3.

4. The Court of Appeal erred in failing to consider defendants' constitutional arguments.

SUMMARY OF THE ARGUMENT

* * *

The foregoing aside, taxation of the commission on a writ of non-resident attachment against a non-resident defendant is a violation of the United States Constitution's Commerce Clause, Article 1, Section 8, Clause 3. In this case where the sheriff's commission is almost $300,000 for $1,200 worth of work, the commission is not fairly apportioned, does not fairly relate to the services provided by the State, and serves to discriminate against interstate commerce. Defendants raised their constitutional defenses in the trial court clearly and at the first available opportunity. The Court of Appeal erred in failing to address these defenses.

Appendix I

ARGUMENT

* * *

III. The Commission Acts as an Unconstitutional Tax when Applied to Non-Resident Defendants. The District Court thus Erred in Taxing the Commission against the Defendants.

A writ of non-resident attachment can issue, by definition, only against non-residents. If the Louisiana Legislature drafted the sheriff's "commission" statute to permit recovery of the commission against non-resident defendants where a writ of non-resident attachment was obtained, an unconstitutional taking would occur. Louisiana resident defendants would never shoulder the burden of this onerous commission. In essence, only non-residents would be "taxed" for the privilege of being sued in Louisiana courts. Such a tax violates the United States Constitution's Commerce Clause, Article 1, Section 8, Clause 3.

It is recognized not all state taxes on interstate commerce are invalid. However, those which cannot satisfy tests of fairness and reasonable relation are invalid:

> "Prior case law has established that a state tax is not per se invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way. . . . The State's right to tax interstate is limited, however, and no state tax may be sustained unless the tax: (1) has as substantial nexus with the State; (2) is

> fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state." *Maryland v. Louisiana*, 451 U.S. 725, 753, 101 S.Ct. 2114, 68 L.Ed.2d 576, 600 (1981).

In *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992), the United States Supreme Court struck down Alabama's disposal fee imposed on hazardous waste generated out of the state but not on waste generated in the state. In so doing, the court stated:

> "The Act's additional fee facially discriminates against hazardous waste generated in States other than Alabama. . . . Such burdensome taxes imposed on interstate commerce alone are generally forbidden: 'A State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'. . . . **Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry.** *Chemical Waste Management v. Hunt*, 504 U.S. at 342, 119 L.Ed.2d at p. 132. (Citation omitted; bold added)

Applying the foregoing to the subject facts, a sheriff's tax on non-resident defendants for the issuance of writs of non-resident attachment is unconstitutional. Applying the United States Supreme Court's four part test, at least three of the conjunctive factors have been violated:

(1) The tax discriminates against interstate commerce. By definition, a non-resident attachment cannot issue against a resident. Therefore, resident defendants would always be spared the tax, while non-resident defendants would not.

(2) The tax is not fairly related to the services provided by the state. In the subject case, the sheriff served a writ of non-resident attachment on a vessel master, telephoned the pilot's association to restrict the vessel, and five days later telephoned the pilot's association to release the vessel from attachment. The sheriff's entire cost for effecting the seizure was $1,260. For this, the sheriff obtained a 6% commission on a $4,955,673 judgment – almost $300,000! The commission taxed is thus over 230 times greater than the sheriff's actual cost. Under no circumstances can such a tax imposed only against non-resident defendants be substantiated as fairly related to the level of service provided.[17]

(3) The tax is not fairly apportioned. As indicated above, under the district court's interpretation of the law, only non-residents would pay the

17. Indeed, the defendants do not benefit from any state services when their property engaged in international commerce is seized on the Mississippi River for a cause of action having nothing to do with the property or the state of Louisiana.

> tax in cases where writs issue for non-resident attachment. Under the facts of this case, the sheriff would reap a sum approximating one-third of its entire annual operating budget for all operations from an entity not benefitting, at all, from the service provided. It is only the plaintiff who benefits from this service.

To withstand constitutional scrutiny, the tax must satisfy all four Supreme Court factors. At most, this commission satisfies one. Accordingly, it is unconstitutional if it is applied to non-resident defendants subject to a writ of non-resident attachment.

If the commission is assessed only against the plaintiff in writ, as is specified by both the Act itself and the *Tucker* decision, the commission does not run afoul of many of the Commerce Clause factors. More specifically, resident and non-resident plaintiffs have equal access to the writ procedure and knowledge, in advance, that they will be responsible for the sheriff's lien. Applied in this fashion, resident plaintiffs do not obtain inequitable advantages over non-resident plaintiffs where a non-resident attachment is effected.[18]

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18. Even applied in this fashion, defendants submit a commission of roughly $300,000 for less than 3 hours work is an unconstitutional taking and an impermissible fine or penalty. The statute should be read to avoid such a result and it can be. It provides "Sheriffs shall be entitled *to no more than* the following . . . compensation." It thereafter states permissively that a "six percent commission shall be *allowed*." Thus, the statute sets a ceiling – not a floor.

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Plaintiff attempts to avoid the constitutional prohibitions by arguing that the "commission" is not a "tax". This is a distinction without a difference, and constitutional prohibitions cannot be avoided merely by calling a "tax" a "commission". Indeed, in *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992), the Supreme Court struck down as unconstitional a waste disposal "fee" imposed by the State of Alabama on "non-resident" waste. The "fee" was treated as a "tax". The sheriff's "commission" in this case is not a charge for services rendered. Had that been the case, the commission would be for an amount closely related to the $1260 stipulated as the cost of the sheriff for this attachment. When a "fee" or "commission" is entirely disproportionate to the services provided, it is a tax.

During oral argument, plaintiff stated it was easy for a non-resident defendant to avoid a non-resident attachment – simply appoint an agent for service of process and consent to general jurisdiction in the state. This approach would simply substitute one unconstitutional act for another. *See, Bendix Auto Lite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed. 2d 896 (1988). In *Bendix*, the Court addressed the constitutionality of an Ohio law which tolled the statute of limitations against a non-resident corporation for such period as the corporation was not "present" in the state. The plaintiff defended the statute, stating a defendant could avoid the effects of the statute by appointing an agent for service of process and submitting to the general jurisdiction of Ohio courts. The Supreme Court concluded the Ohio statute was unconstitutional as an infringement on the Commerce Clause. Addressing the

suggestion that the defendant should appoint an agent for service of process, the court stated:

> "The State may not withdraw such defenses on conditions repugnant to the Commerce Clause. Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce. The state may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain. . . ." 46 U.S. 888, 894, 108 S.Ct. 2218, 2223, 100 L.Ed. 2d 896, 903.

Further addressing the issue, the court stated:

> "In the particular case before us, the Ohio Tolling Statute must fall under the Commerce Clause. Ohio cannot justify its statute as a means of protecting its residents from corporations who become liable for acts done within the State but later withdraw from the jurisdiction, for it is conceded by all parties that the Ohio Long-Arm Statute would have permitted service on Midwesco through the period of limitations. The Ohio Statute of Limitations is tolled only for those foreign corporations that do not subject themselves to the general jurisdiction of Ohio courts. In this manner the Ohio statute imposes a

> greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulations. . . . The suggestion that Midwesco had the simple alternatives of designating an agent for service of process and its contract with Bendix for tendering an agency appointment to the Ohio Secretary of State is not persuasive. . . . [A] designation with the Ohio Secretary of State of an agent for the service of process likely would have subjected Midwesco to the general jurisdiction of Ohio courts over transactions in which Ohio had no interest. As we have already concluded, this exaction is an unreasonable burden on commerce." 486 U.S. 888, 895, 105 S.Ct. 2218, 2223, 100 L.Ed. 2d 896, 904.

Because one unconstitutional act should not be substituted for another, plaintiff's argument that defendants could have appointed an agent for service of process to avoid attachment is without merit.

Also without merit is plaintiff's statement that the federal court effects non-resident attachment so the state court can as well. This argument ignores the fact that the United States Marshal does not demand a percentage commission on the value of the property attached or adjudicated. Rather, the Marshal requires a $10,000 deposit which is "drawn down" by the daily expenses incurred. If the attachment is released immediately, the vast majority of the deposit is returned. Nowhere is either party required to pay the Marshal more

than the actual expenses incurred. Thus, unlike the Louisiana system, the federal system does not contain a "profit center" wholly unrelated to the value of the services provided.

IV. Defendants Raised Their Constitutional Defenses Appropriately in the Trial Court. The Court of Appeal Erred in Failing to Consider These Defenses

In its reasons for judgment, the Court of Appeal declined to consider defendants' constitutional attack on the sheriff's commission for the following reasons:

1. The unconstitutionality of the statute was not specifically set forth in a pleading;

2. The Attorney General was not served with a copy of the pleading contesting the constitutionality of the statute.

It must be kept in mind that final judgment had already been entered in the case when the commission issue first arose. There were no petitions, exceptions or answers to be filed. Defendants raised their constitutional attack on the first possible occasion – ten days after the sheriff's motion to tax commission, in their January 25, 1999 memorandum in opposition to the sheriff's motion. It was not until the sheriff filed his motion on January 15, 1999 that defendants were faced with an unconstitutional act. Defendants' January 1999 memorandum clearly set forth the basis of the constitutional attack. The memorandum not only cited applicable United States Supreme Court law, but specifically referenced the United States Constitution's Commerce Clause, Article 1,

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Section 8, Clause 3. Defendant's constitutional attack was further addressed in supplemental memoranda filed on July 16 and September 3, 1999. Hearing on the sheriff's motion to tax costs was conducted on September 7, 1999. It was continued to that date from an earlier August 3, 1999 date so that defendants could obtain testimony from the sheriff for use at the hearing. A subpoena was issued requiring the sheriff's attendance at the hearing to obtain testimony in support of the constitutional arguments. In consideration of the Court's and the sheriff's time, the parties agreed to stipulate to the sheriff's testimony. This testimony (by stipulation) was directed almost exclusively to facts in support of the constitutional argument, i.e., the sheriff should not be paid almost $300,000 for performing $1,200 worth of work. The parties orally argued the case, and the judge thereafter entered judgment after considering this evidence.

Against this set of facts, it is clear the constitutional issues were fully and fairly addressed in the trial court. No party legitimately could claim surprise given thorough briefing of the constitutional issues. Indeed, the only testimony presented at the hearing, that from Sheriff Hingle, pertained almost exclusively to the constitutional issues. Thus, the constitutional issues were sufficiently raised before the trial court, and are properly before this Court for review.

It is admitted a longstanding jurisprudential rule exists. Constitutional issues must be raised sufficiently in the trial court before appellate consideration is sought. It is denied the rule contains an inflexible, technical requirement when the act challenged is an action taken after final judgment has been entered. Many of this Court's earlier decisions make

no reference to a restrictive "pleading" requirement, but merely require that the issue be "raised" in the lower court. Other decisions have commented, in passing, that the issue should be raised by pleading or otherwise in the trial court. For example, in *Allopathic State Board of Medical Examiners v. Fowler*, 50 La. Ann. 1358, 24 So. 809 (La. 1898), the Court stated:

> "In *State v. St. Romes*, 26 La. Ann. 754, we held that the constitutionality of a law would not be considered when an issue to that effect has not been raised in the case below. The same rule applies to cases where special grounds of unconstitutionality are set up for the first time in this court, and particularly those where an examination of evidence would be needed for a decision of the questions submitted . . ." *Allopathic, supra*, 50 La.Ann. 1358, 24 So. 809, 812 (La. 1898).

To similar effect, the Supreme Court stated in *Scovell v. St. Louis Southwestern R. Co.*, 114 La. 847, 38 So. 582 (La. 1905):

> "Under the jurisprudence the questions of unconstitutionality should always be presented before the court of original jurisdiction. They should not be raised for the first time on appeal." *Scovell, supra*, 38 So. 582, 583-584, (La. 1905). *See also, State ex rel. People's Fire Ins. Co. of New Orleans v. Michel*, 125 La. 55, 51 So. 66, 69 (La. 1909).

Similarly, in *Saint v. Martel*, 53 So. 432 (La. 1910), the Court stated:

> "The suggestion, made for the first time in the oral argument in this court, that the statute thus cited is unconstitutional, cannot be entertained. Defendant had the opportunity to raise the question in the district court, and having failed to do so, cannot be heard to raise it here . . ." *Saint, supra*, 127 La. 73, 53 So. 432, 437, (La. 1910).

This jurisprudential rule is not inflexible, and should be interpreted to do substantial justice. Boiled down to its essentials, the primary concern is that constitutional issues be set forth with specificity in the trial court so that they may be fairly addressed before resort to the Court of Appeal. In *City of New Orleans v. Plotkin*, 205 La. 490, 17 So.2d 719 (La. 1944), the Court stated:

> "The plea, in this instance, is too vague to put at issue the unconstitutionality of the law attacked. The court cannot be expected to make an examination to ascertain the various laws under which plaintiff may have acted and to ascertain wherein they violate the due process clause of the Constitution of the United States, or are otherwise unconstitutional, and, if they are, in what respect they are so, nor can the opposite party to the litigation, under these circumstances, be expected to meet the attack, for he is not sufficiently informed by the plea to undertake the task, and moreover, the burden is not upon him to show

> that they are constitutional. . . ." *Plotkin*, *supra*, 17 So.2d 719 721 (La. 1944).

Technical adherence to a "pleading" requirement, i.e., that the constitutional defenses be asserted in a petition or answer, simply does not promote justice in this case. First, the issues were as fully identified and litigated in the state court action as if they were included in a pleading defined in Article 852 of the Louisiana Code of Civil Procedure. Second, defendants cannot identify a pleading within the confines of this case in which they logically could have asserted the constitutional defenses. At the time the judgment was rendered on the main demand in January 1996, the law clearly provided that the plaintiff in writ was responsible for the sheriff's commission. It is untenable to suggest the defendants were required, in their answer, to state something akin to

> "defendants are not negligent or otherwise at fault for plaintiff's accident. In the event they are cast in judgment and the sheriff intervenes to tax against them a commission due from the plaintiff in writ, they contend any such future conduct by the sheriff would be unconstitutional as applied to them."

It is respectfully submitted such foresight should not be presumed or required.

The entity receiving the commission, the sheriff, was not even a party to this suit at the time of its filing. He did not surface in this litigation until January 1999, when he filed his motion requesting his commission from the defendants. Louisiana's procedural rules do not provide for an Article

852 "pleading" in response to the sheriff's motion. The defendants availed themselves of the only "responsive pleading" available to such motion – a memorandum in opposition. Because defendants timely raised their constitutional defenses in this first responsive pleading, and indeed in every one thereafter, they have suitably protected their right to argue the constitutional issues before this Court.[19]

The Court of Appeal also concluded defendants failed to notify the Attorney General of their constitutional arguments, thus preventing appellate review. Defendants respectfully submit this legal conclusion is erroneous.

Article 1880 of the Louisiana Code of Civil Procedure requires the notification of the Attorney General of a constitutional attack on a statute. This article is contained within the section of the Code of Civil Procedure addressing Declaratory Judgment actions. Because the plaintiff's original action and the sheriff's motion to tax costs do not constitute Declaratory Judgment actions, it is respectfully submitted this article is inapplicable to this case.

Louisiana Revised Statute 49:257(B) discusses the authority of the Attorney General, at his discretion, to participate in any action where the constitutionality of a state statute is challenged. Nowhere does the statute allocate the

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19. Article 1154 of the Louisiana Code of Civil Procedure specifies that pleadings are deemed amended to include issues which are tried by express or implied consent of the parties, even when not specifically raised in the pleadings. Defendants respectfully submit the September 1999 hearing before Judge Roe expanded the pleadings to include the constitutional issues.

responsibility for notifying the Attorney General of the constitutional challenge. Louisiana Revised Statute 13:4448 contains a notice requirement, and specifies the Courts of Appeal and the Supreme Court of Louisiana must notify the Attorney General of proceedings attacking the constitutionality of a statute prior to adjudication. Defendants have been unable to find any statute or code article placing upon them the duty to notify the Attorney General of their constitutional attacks.[20]

If, after considering the above, the Court still concludes the constitutional issues are not ripe for appellate review, defendants ask the Court to remand this action to the trial court for further consideration. The Court is authorized to grant this relief pursuant to Article 2164 of the Louisiana Code of Civil Procedure, which specifies in pertinent part:

> The Appellate Court shall render any judgment which is just, legal, and proper upon the record on appeal . . .

On more than one occasion, this Court has remanded constitutional issues "for the ends of justice" pursuant to this article. *See, Summerell v. Phillips*, 247 So.2d 542, 548 (La. 1971); and, *Scovell v. St. Louis Southwestern Co.*, 114 La. 847, 38 So. 582 (1905).

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20. Defendants do not deny it would be a good practice to notify the Attorney General. However, in the absence of a statute or code article specifically requiring defendants to do so, defendants should not lose the right to appellate review of their constitutional arguments.